United Nations A/HRC/28/32

General Assembly

Distr.: General
29 January 2015

Original: English

Human Rights Council
Twenty-eighth session
Agenda items 2 and 3
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Summary of the discussions held during the expert consultation on the administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations

Report of the United Nations High Commissioner of Human Rights

Summary

In its resolution 25/4, the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to organize an expert consultation for an exchange of views on human rights considerations relating to the issues of administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations. The expert consultation was held on 24 November 2014 in Geneva. The present report was prepared by OHCHR pursuant to the request of the Council.

The main issues discussed during the consultation were independence, impartiality and competence of the judiciary, including military courts; the right to fair trial before courts, including military courts, and other procedural protections; the personal jurisdiction of military courts; and subject matter jurisdiction of military courts.

GE.15-01324 (E)

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I. Introduction

1. In its resolution 25/4, the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to organize an expert consultation for an exchange of views on human rights considerations relating to the issues of administration of justice through military tribunals and the role of the integral judicial system in combating human rights violations, and to present a summary of the discussions to the Council at its twenty-eighth session. The expert consultation was held in Geneva on 24 November 2014.

II. Statement of the United Nations Deputy High Commissioner for Human Rights

2. The United Nations Deputy High Commissioner for Human Rights opened the expert consultation by pointing out that the wide variety of military justice systems made generalizations about such institutions difficult, if not impossible. These systems had developed over time as a result of each country's unique history, legal tradition and choices.

3. In a significant number of States, military tribunals were perceived as credible judicial institutions and subject to civilian judicial oversight. In other States, however, Governments had used military justice to persecute opposition figures and to shield military personnel who committed serious human rights violations.

4 International human rights treaties, including the International Covenant on Civil and Political Rights, did not refer specifically to military courts. Nevertheless, human rights treaties, and in particular the International Covenant on Civil and Political Rights, were of great relevance to the issue of the administration of justice through military tribunals. The Human Rights Committee, in its general comment No. 32, stated that the Covenant did not prohibit trials by military courts. It also stated, however, that the guarantees of the Covenant could not be altered by the military character of a court.

III. Overview of panel presentations and discussions

A. Independence, impartiality and competence of the judiciary, including military courts

5. The Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, pointed out that military tribunals had to be an integral part of the general justice system and administer justice in a manner that was fully compliant with international human rights standards, including articles 9 and 14 of the International Covenant on Civil and Political Rights. She noted that, in its general comment No. 32, the Human Rights Committee stated that the requirement of independence referred, in particular, to the procedure and qualifications for the appointment of judges, and to guarantees concerning their security of tenure, the conditions governing promotion, transfer, suspension and cessation of their functions and the actual independence of the judiciary from political interference by the executive branch and legislature.

6. The Special Rapporteur recommended that the independence of military tribunals and their inclusion within the general administration of justice system of the State should be legally guaranteed at the highest possible level; domestic legislation should include specific

guarantees to protect the statutory independence of military judges vis-à-vis the executive branch and the military hierarchy and to enhance the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary; and the status of military judges, including their security of tenure, adequate remuneration, conditions of service, pensions and age of retirement, should be determined by law, and military judges have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, and be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures set out in the law.

7. The Special Rapporteur also recommended that the role and functions of convening officers should be clearly defined by legislation so that they could act independently of external pressure and be prevented from acting in ways that might hinder the independent and impartial administration of justice, and that domestic law should identify objective criteria for the selection of military judges on the basis oftheir integrity, ability, qualifications and training. Lastly, she reiterated her position that States should consider adopting the draft principles governing the administration of justice through military tribunals.[1]

8. The former Attorney General for the Armed Forces in Norway, Arne Willy Dahl, stated that there had been significant changes in national military justice systems in recent years. The systems could be divided broadly into "Anglo-American" systems based on courts martial convened for the individual case, and "European continental" systems based on standing courts; some States had even dispensed with military courts altogether, having military penal cases heard before civilian courts. This might be a civilian court with specialized military expertise, or a fully civilian non-specialized court. The systems could also be different in peacetime and in wartime.

9. Mr. Dahl concluded that the various military justice systems could be arranged along an axis, with the traditional fully military courts martial system at the one end, and the fully "civilianized" system at the other. The general trend for changes in military justice systems was to move from the left to the right of the table below.

Courts martial convened for individual cases	Standing military courts	Specialized civilian courts	General civilian courts in peacetime	General civilian courts in peace and war

10. Mr. Dahl observed, however, that what might be relevant in a peacetime perspective could prove dysfunctional when troops were deployed abroad. When soldiers committed crimes against local civilians whom they were supposed to protect, putting the accused on an airplane for prosecution at home did not make a good impression. Affected civilians needed to see that justice was done, and this was best demonstrated by having deployable courts. Status of Forces Agreements typically allowed for exercise of jurisdiction by military courts of the sending State, while the exercise by civilian courts of jurisdiction on foreign territory was an anomaly.

11. According to Mr. Dahl, issues relating to the convening authority system and for the imposition of punishment by summary procedures raised human rights concerns. He concluded by highlighting the clear trends in military justice with regard to the rights of the accused: more independence of judges; increased use of standing courts; increased rights to elect trial instead of summary procedures; and increased right to legal representation.

[1] E/CN.4/2006/58.

12. Umesh Chandra Jha, a retired Wing Commander in the Indian Air Force, gave an overview of military justice in South Asian States, including Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka, where 2.4 million military personnel and 1.6 para-military personnel were subject to military justice. The British Indian military law of 1911 was the progenitor of military legal systems in South Asia. The types of trials were, broadly speaking, summary court martial; summary/field general court martial; district court martial; and general court martial.

13. With regard to summary trials, Mr. Jha noted that, for officers up to the rank of major and lower ranks, the accused was not entitled to legal assistance, the rules of evidence were not applicable, proceedings were not open to the public, and there was no right to appeal. Summary punishments for officers and junior commissioned officers could include forfeiture of service/seniority up to 12 months, stoppage of pay and allowances, and reprimand. For personnel below the rank of junior commissioned officer, summary punishment could include detention up to 28 (and in some cases 42 days), field punishment, extra duties, a fine, deprivation of rank, and reprimand.

14. The other types of court martial were based on the convening authority system. Mr. Jha explained that the power of the convening officer included the persons to tried; the charges to be brought; the composition of the court; command over the prosecutor and the officer for the defence, as well as the Judge Advocate General, whose role is to provide advice on legal questions but who does not function as an advocate or a judge; confirmation of the findings and sentence or sending back the proceeding for revision; and deciding on post-confirmation petitions. There was no right to appeal against the decision of the convening authority, although in India, an armed forces tribunal had appellate jurisdiction over courts martial.

15. Mr. Jha pointed out that the armed forces in many South Asian countries, such as Bangladesh, India, Nepal, Pakistan and Sri Lanka, had been mandated by security and anti-terrorism laws to aid the civilian authorities to address terrorism and militancy. In this context, members of the armed forces in a number of the said States had been accused of serious human rights violations, such as enforced disappearances, extrajudicial executions, rape, arbitrary detention and torture. To summarize, military law in South Asian countries did not include war crimes as defined under the Rome Statue; the concept of command responsibility had not been incorporated into military law; the right to fair trial as defined in article 14 of the International Covenant on Civil and Political Rights was not observed; there was a need for manuals on the laws of war; and that civil society doubted the fairness of military trials. Mr. Jha recommended, inter alia, the abolition of summary courts; rationalizing the powers of the convening authority; insulating the Judge Advocate General from the military chain of command; the abolition of degrading or humiliating forms of punishment; legal aid for accused persons during trial and appeal; the establishment of courts of appeals; and updating military legal systems by including the crimes contained in the Rome Statute and the concept of command responsibility.

16. During the discussion, the representative of Belarus stated that, to better ensure fair trial guarantees, States should not use closed or specialized tribunals for suspected terrorists. The representative of Mexico explained that the State had undertaken a reform in 2014 to transfer jurisdiction over alleged human rights violations by military persons to civilian courts. The representative of the Centre for Legal Studies stated that military justice had been used in Argentina and other Latin America countries to secure impunity for military personnel who had committed serious human rights violations.

B. Right to fair trial before courts, including military courts, and other procedural protections

17. According to Alexander Nikitin, Professor and Director of the Centre for Euro-Atlantic Security at the Moscow State Institution for International Relations, many judicial systems were characterized by an absence of integrity and jurisdiction was too fragmented. Mr. Nikitin highlighted at the international level the fragmented nature of the international criminal justice system, and pointed out that ad hoc international criminal tribunals could be created by the Security Council; hybrid courts could be established on the basis of a treaty between a State and the United Nations, or by the United Nations in areas or States subject to peacekeeping operations; and that cases could also be brought before the International Criminal Court.

18. Mr. Nikitin stated that the United States of America was a case of a lack of juridical integrity at the national level. Military courts used the convening authority system for the ad hoc nomination of officers, who might not have legal education, and could be biased, particularly if they came from the same contingent as the accused. Military justice in the United States was fragmented, such as in the case of the creation of military commissions for adversarial combatants. Mr. Nikitin observed that few prisoners in Guantanamo had been sentenced. Foreign suspects tried by military commissions did not have the same constitutional rights as other persons in the United States. He stressed the need to guarantee that military commissions do not use evidence gathered through torture or other cruel, inhuman or degrading treatment.

19. Mr. Nikitin argued that the United States of America had brought a disproportionate number of prosecutions against persons for terrorist-related offences when compared with other States, and that a large majority of these prosecutions had been brought against foreigners or foreign organizations.

20. Mr. Nikitin recommended that, in order to ensure the right to a fair trial, there should be a higher level of integrity in judicial systems, and that the principle of equal (comparable) prosecution should be applied for equal (comparable) crimes. It would be necessary to eliminate non-standard and non-transparent elements of judicial systems, such as courts martial not subordinated to the general principles of civilian justice or extraordinary military commissions. He advocated for the regulation of private military and security companies and the adoption of the draft convention thereon. Mr. Nikitin concluded that it was necessary to fill gaps in the law, and argued that there should be a coordinated approach to justice issues, particularly in non-recognized and failed States.

21. Dheerujlall Seetulsingh, a member of the Human Rights Committee, referred to the procedural protections set out in article 14 of the International Covenant on Civil and Political Rights. The Human Rights Committee stated in its general comment No. 32 that the provisions of article 14 applied to all court and tribunals, whether civilian or military, and that article 14 did not prohibit military courts from trying civilians. It also stated that such trials should be exceptional, that is, limited to cases where the State party could show that resorting to such trials was necessary and justified by objective and serious reasons, and where, with regard to the specific class of individuals and offences at issue, regular civilian courts were unable to undertake the trials.

22. Mr. Seetulsingh pointed out that, in 1999, the Human Rights Committee had recommended that Chile amend the law so as to restrict the jurisdiction of military courts to try military personnel only for offences of an exclusively military nature.[2] Also in 1999,

[2] CCPR/C/79/Add.104.

again regarding Chile, the Committee had recommended that human rights violations by members of security forces should not fall within the purview of military tribunals. Mr. Seetulsingh added that similar recommendations had been made for other states, including the Central African Republic, Colombia, Mexico, Peru and the Russian Federation.

23. In *Estrella* v. *Uruguay* (communication No. 74/1980), the Human Rights Committee found violations of article 14 because the accused was tried in camera, did not have the assistance of counsel, and attempts were made to compel him to testify against himself.[3] In *Mansaraj* v. *Sierra Leone* (communication No. 839/1998),[4] the Committee stressed that there should be the right to appeal to a higher tribunal from a military court. In *Kurbanova* v. *Tajikistan* (No. 1096/2002),[5] the Committee found a violation of article 14 because the State had not provided any information to justify the trial of a civilian before the Military Chamber of the Supreme Court. In *Madani* v. *Algeria* (communication No. 1172/2003),[6] the Committee found a violation of article 14 because the State party had not justified the trial of a civilian before a military court. Two members of the Committee disagreed with the views expressed in *Madani*, pointing out that article 14 was not concerned with the nature of a tribunal as long as it was competent, independent and impartial. They argued that the Covenant did not prohibit the use of military tribunals; in Algeria, military courts had assigned jurisdiction established by law; the Committee could not replace the State to adjudicate on the merits of alternatives to military courts, nor could it adjudicate on exceptional circumstances to determine whether or not there was a public emergency. Mr. Seetulsingh added, that in *Akwanga* v. *Cameroon* (No. 1813/2008),[7] the Committee had found a violation of article 14 when the State party did not justify why a civilian was tried by a military court, and concluded that it did not need to examine whether the military court, as a matter of fact, had afforded the full guarantees of article 14.

24. In concluding, Mr. Seetulsingh asked whether there was a danger that the uncompromising approach by the Committee might lead to a situation where the views of the Committee were more honoured in the breach than inobservance. He pointed out that the grounds of the dissent in *Madani* were worth considering, since many States parties to the Covenant remained unwilling to comply with the views of the Committee.

25. Seong-Phil Hong, a member of the Working Group on Arbitrary Detention, explained that the Working Group had found that military tribunals were often used to deal with political opposition groups, journalists and human rights defenders, and that placing of civilians in preventive detention and the trial of civilians by military courts constituted a violation of the International Covenant on Civil and Political Rights.

26. A military judge who is neither professionally nor culturally independent was likely to produce an effect contrary to that afforded by guarantees of a fair trial. The Working Group had determined that a court composed of military personnel could not be considered "a competent, independent and impartial tribunal" under human rights law.

27. The Working Group had determined that military tribunals should only be competent to try military personnel for military offences; if civilians and military personnel had been indicted in a case, military tribunals should not try the military personnel separately; military courts should not try military personnel if any of the victims are civilians; military tribunals should not be competent to consider cases of rebellion, sedition

[3] See Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40 (A/38/40), annex XII.

[4] CCPR/C/72/D/839/1998.

[5] CCPR/C/79/D/1096/2002.

[6] CCPR/C/89/D/1172/2003.

[7] CCPR/C/101/D/1813/2008.

or attacks against a democratic regime; and military tribunals should never be competent to impose the death penalty.

28. The Working Group had found that justice by military courts often fell into the five categories of arbitrariness identified in its methods of work: military forces often stop and detain persons for a long time, and military judges often order continuing detention in the absence of any legal basis; many detainees brought before military courts have been detained simply for exercising a fundamental freedom, such as the freedom of opinion and expression, association, assembly or religion; military judges and prosecutors often do not meet the fundamental requirements of independence and impartiality; procedures applied by military courts often do not respect the basic guarantees for a fair trial; and individuals brought before military courts are often foreign nationals, including migrants in an irregular situation, asylum seekers and refugees captured by military forces at borders, at sea and in airports.

29. Ronald Naluwairo, Senior Lecturer at the School of Law of Makerere University in Uganda pointed out that the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights in May 2003, addressed military courts. According to section L of the Principles and Guidelines, the only purpose of military courts was to determine offences of a purely military nature committed by military personnel; military courts were required to respect the fair trial standards specified in the African Charter and in other parts of the Principles and Guidelines; and military courts should not have jurisdiction over civilians.

30. Mr. Naluwairo discussed military justice in Uganda. Section 119 of the Uganda Peoples' Defence Force Act, 2005 gave wide jurisdiction over many categories of civilians. These categories included civilians who served in the position of an officer or militant in any force raised and maintained outside Uganda and commanded by an officer of the Uganda Defence Forces; civilians who voluntarily accompanied any unit or other element of the defence forces on service; civilians who served in the defence forces under engagements by which they agreed to be subject to military law; civilians who aided or abetted a person subject to military law in commission of a service offence; civilians found in unlawful possession of arms, ammunition or equipment ordinarily being the monopoly of the defence forces; and persons not subject to military law who had committed offences while subject to military law.

31. Mr. Naluwairo noted that, in its concluding observations on the third periodic report of Uganda, the African Commission on Human and Peoples' Rights had recommended that the State introduce legal measures that prohibited the trial of civilians by military courts. He added that the Uganda Peoples' Defence Force Act, 2005 did not provide adequate safeguards to guarantee the independence and impartiality of military courts; judge advocates, prosecutors and members of the military courts were all appointed by the same authority and serving military personnel. Mr. Naluwairo stated that there were no known objective criteria for appointing, re-appointing, suspending or dismissing judge advocates and members of the military courts; the law was silent on the security of tenure of judge advocates, although, in practice, they were appointed to serve for a period of one year and were eligible for re-appointment. He added that in *Uganda Law Society and Jackson Karugaba v. Attorney General*, the Constitutional Court held that "it is not possible for Uganda's military courts to be independent and impartial given the current laws under which they are constituted and the military structure within which they operate."

32. With regard to the right to a public hearing, Mr. Naluwairo stated that the trials conducted by the Division Courts Martial in barracks were difficult for members of the public to attend. In addition, members of the public had been increasingly excluded from attending hearings of General Courts Martial or at the Court Martial Appeals Court on grounds of national security.

33. Mr. Naluwairo explained that there was no general right to appeal decisions of military courts to civilian courts. No appeal could be made from the Court Martial Appeals Court to any other court, except in cases against convictions involving the death penal and life imprisonment that had been upheld by the Court Martial Appeals Court.

C. Personal jurisdiction of military courts

34. The Vice-Chairperson of the Working Group on Enforced or Involuntary Disappearances, Jasminka Dzumhur, referred to the Declaration on the Protection of All Persons from Enforced Disappearance, and in particular to article 16, paragraph 2, which stated that persons alleged to have committed any act of enforced disappearance were to be tried "only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts."

35. In its country visit reports, the Working Group had consistently recommended that the jurisdiction of civilian courts should be guaranteed in all matters relating to enforced disappearances and violations of human rights, regardless of whether the perpetrator was a member of the military.[8]

36. In December 2010, the Working Group published a report on best practices on enforced disappearances in domestic criminal legislation, which highlighted best practices in the area of legislation and provided that enforced disappearances could never be considered an in-service offence and that military or other special courts had no jurisdiction on enforced disappearances.[9]

37. Article 3 of the Declaration on the Protection of All Persons from Enforced Disappearance required the adoption of preventative measures, which included not establishing military jurisdiction over crimes of enforced disappearance. In its country visits, the Working Group had found situations in which national legislation prohibited military personnel from being subjected to the jurisdiction of ordinary courts.[10] In these cases, the Working Group had consistently emphasized how military jurisdiction could be a factor of impunity for human rights violations, given that military courts lacked the necessary independence and impartiality to address human rights violations.[11]

38. Ms. Dzumhur stated that the exclusion of the competence of military jurisdiction was also essential during the investigation phase. In one country visit report, the Working Group had recommended that the State should ensure that civilian prosecution services conduct serious and prompt investigations into all complaints of human rights violations, including enforced disappearances by military personnel.[12]

39. Ms. Dzumhur pointed out that article 16 (1) of the Declaration on the Protection of All Persons from Enforced Disappearance provided that persons alleged to have committed an enforced disappearance should be suspended from any official duties during the investigation.

40. Eugene Fidell, Professor at Yale University Law School, stated that the goals of military justice should be to advance national security by ensuring discipline in the military;

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[8] See for example A/HRC/19/58/Add.2, para. 98.
[9] A/HRC/16/48/Add.3, para. 62 (l).
[10] A/HRC/22/45/Add.2, para. 74.
[11] Ibid, paras. 37 and 74. See also A/HRC/19/58/Add.2, para. 38.
[12] A/HRC/19/58/Add.2, para. 98. Mexico subsequently abolished the military jurisdiction for the crime of enforced disappearance.

to punish and deter crime fairly; to respect human rights; to support democratic institutions; to minimize friction between the military and civilians; to engage and maintain public confidence; and to encourage recruitment and the retention of personnel. In terms of public confidence in military justice, he suggested that the "public" included voters, military personnel, parents of conscripts or potential volunteers, the legal profession and scholarly community, the legislature, the executive branch, civilian courts, the Human Rights Council and the Human Rights Committee, regional human rights courts and bodies, and foreign Governments and citizens.

41. According to Mr. Fidell, questions could arise with regard to who was subject to military jurisdiction This would normally include active duty personnel, although it raised the question of whether this included persons to be integrated into the armed forces prior to enlistment. He also asked whether this would cover reservists or soldiers who had retired or been recently discharged. He subsequently raised the issues of civilians in general, explaining that questions had arisen, for example, about persons who had resisted conscription and refused to join the military, government employees and contractors working for the military, military dependents, and a wide range of persons with no specific relation to the military.

42. While noting that the Human Rights Committee in its general comment No. 32 stated that civilians could, in exceptional situations, be tried in military courts, Mr. Fidell made reference to a concurring opinion in *Musaev* v. *Uzbekistan* (communications Nos. 1914-16/2009), where two members of the Committee stated that "civilians or retired military personnel" should never be tried before military courts and that the Committee needed "to review the current position of the Committee, which considers the trial of civilians in military courts to be compatible with the Covenant.[13]

43. According to Mr. Fidell, there were two basic approaches to determine whether civilians should be tried in military courts: a statutory approach, which specified clear dividing lines concerning who could and could not be tried by military courts; and an ad hoc case-specific approach. The potential tests that could be applied in the latter approach could include considerations of whether there would be an abuse of process in military courts; whether the proportional loss of benefits of a civilian process would be outweighed by the benefit of a military trial in certain circumstances; and whether a civilian forum was available to try the civilian in a given case.

44. Mr. Fidell referred to *Martin* v. *United Kingdom*, in which the European Court of Human Rights stated that:

> While it cannot be contended that the Convention [for the Protection of Human Rights and Fundamental Freedoms] absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6... The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case...

45. In *The Queen v. Wehmeier*, the Court Martial Appeal Court of Canada articulated a test for exercising military jurisdiction over civilians, stating:

[13] CCPR/C/104/D/1914, annex, appendix.

> The issue is not whether the respondent should be prosecuted at all, but whether the interest in having him tried in the military justice system is proportional to his loss of rights when tried in that system. .... In the absence of such a justification, we can only conclude that the effects of prosecuting the respondent in the military justice system are disproportionate. As a result, the respondent's prosecution is a breach of the respondent's right not to be deprived of his liberty, except in accordance with the principles of fundamental justice contrary to section 7 of the Charter.

46. The Court went on to say that:

> We should not be taken as saying that all prosecutions of civilians before the military courts necessarily result in a breach of their rights under s. 7 of the Charter. Each case stands to be decided on its own facts. We would say however that where a civilian makes a s. 7 argument based on the loss of procedural rights before the military courts, the onus shifts to the prosecution to justify proceeding before the military courts as opposed to the civilian criminal courts.

47. Mr. Fidell questioned whether negative experiences in some States with trials of civilians in military courts should preclude the trial of civilians in military courts under special circumstances. If a State required a nexus or service connection for military jurisdiction, he asked how it should apply to the prosecution of civilians in military courts. He also asked whether jury membership and the right to counsel should be different when a civilian is tried in military courts.

48. Said Benarbia, Director of the Middle East and North Africa Programme at the International Commissioner of Jurists, addressed the use of military courts in the Middle East and North Africa region. He stated that, in a number of States, military courts had broad jurisdiction to try civilians as well as to try allegations of human rights violations by military and security-related personnel. Military courts had often been a source of impunity because they had been used to shield military and security personnel from accountability for human rights violations. He referred to examples from Egypt, Tunisia and Morocco. In Egypt, under article 5 of the Military Justice Law No. 25 of 1966, military courts had jurisdiction over all crimes where one party, whether the victim or the defendant, was a member of the military. Juveniles could also be tried before military courts under article 8. Furthermore, article 6 of the Military Justice Law authorized the President during a state of emergency to refer any case to a military court.

49. The Constitutions of 2012 and 2014 both perpetuated military jurisdiction. The 2014 Constitution permitted the trial of civilians before military courts for crimes "that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties". A new decree by the President of Egypt, Law No. 136 of 27 October 2014 "on securing and protecting public and vital facilities", further extended the jurisdiction of military courts to try civilians. The law placed all cases involving attacks against "public and vital facilities" under military jurisdiction for the next two years.

50. In Tunisia, following the toppling of President Ben Ali, Law No. 2011-69 amending the Code of Military Justice significantly expanded the scope of the jurisdiction of military tribunals. Article 8 of the Code provides that military tribunals have jurisdiction over military personnel, students at military schools, retired officers when they are called to serve, civilian employees of the army in times of war or during a state of war or when the army or armed force is in an area where a state of emergency is declared, prisoners of war and civilians as authors or co-authors of offences.

51. Article 5 of the Code further provides that military courts have jurisdiction over both ordinary crimes committed by military personnel and ordinary crimes committed against military personnel. In addition, article 6 of the Code provides that "in the case of prosecution for offences under ordinary law committed by military personnel while off-duty and where one party does not belong to the army, the prosecutor or the investigating judge of ordinary courts should defer the charges against the member of the army to the competent military court of first instance". Mr. Benarbia added that military tribunals tried the majority of cases involving human rights violations committed by security and military personnel in Tunisia, including cases of unlawful killings and torture and other ill-treatment committed before and in the context of the uprising from December 2010 to January 2011.

52. Mr. Benarbia explained that, in Morocco, the military courts of the armed forces, in times of peace, had jurisdiction over all crimes and infractions concerning all members of the military, including persons defined by Royal Decree No.1-56-270 as in "active service". Jurisdiction also extended to all persons who, regardless of whether they are members of the military, commit a crime against a member of the armed forces or equivalent bodies, or who commit a crime involving one or more members of the armed forces as their conspirators or accomplices.

53. Mr. Benarbia concluded by drawing attention to the recent positive developments in Tunisia and Morocco. In Tunisia, the 2014 Constitution restricted the jurisdiction of military courts to military offences. In Morocco, draft law No. 108-13 limiting the jurisdiction of military courts to military personnel for military offences had been approved by the first chamber of the Parliament.

54. In the discussion that followed, the representative of Canada stated that, in his country, military courts had jurisdiction of over civilians only in limited circumstances, where it was in the best interests of the individual. The representative of Egypt acknowledged that the issue of trial of civilians had been problematic prior to 2011, but that the situation had since improved. The representative of Cuba explained that military courts were an integral part of the judicial system in Cuba, and that there had been human rights violations at the Guantanamo military base. The delegate of Morocco explained that Morocco had recently adopted a draft law that excluded civilians from military courts. Professor Nikitin stated that the next step that needed to be taken was to integrate common principles into the judicial systems of all States.

D. Subject matter jurisdiction of military courts

55. Christina Cerna, a former Principal Human Rights Specialist at the Inter-American Commission on Human Rights, stated that issues of military jurisdiction generally involved two situations: questions relating to the treatment or trial of civilians by military courts; and military court proceedings, or the lack thereof, against military officials charged with serious violations of human rights.

56. Concerning the trial of civilians in military courts, she referred to the judgement of 25 November 2004 of the case *Lori Berenson* v. *Peru*, where the Inter-American Court of Human Rights stated that military courts should not try civilians labelled as "terrorists", notwithstanding article 173 of the 1993 Constitution of Peru, which provided that military courts could not try civilians except in cases of terrorism or treason. In the judgement of 30 May 1999 of the case *Castillo Petruzzi* v. *Peru*, the Court had held that "domestic laws that place civilians under the jurisdiction of the military courts are a violation of the principles of the American Convention". In the judgements of 29 September 1999 of *Cesti Hurtado* v. *Peru*, and of 22 November 2005 of *Palamara Iribarne* v. *Chile*, the Court held that retired military officials were civilians and could not be tried in military courts. On 30 December

2010, Chile published Law No. 20.477, which explicitly excluded civilians and minors from the jurisdiction of military tribunals.

57. With regard to impunity for military personnel by either the action or inaction or military courts, Ms. Cerna pointed out that, in the judgement of 14 March 2001 of *Barrios Alto* v. *Peru*,[14] the Inter-American Court of Human Rights held that all amnesty provisions were incompatible with the American Convention on Human Rights because they were intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance. They were prohibited because they violated non-derogable rights recognized by international human rights law.

58. Ms. Cerna also referred to a series of cases involving Mexico where the Inter-American Court of Human Rights had held that enforced disappearance, rape and other serious violations of human rights should not be subject to military jurisdiction but rather the jurisdiction of civilian courts.[15] She explained that military jurisdiction had been abolished in Argentina following the friendly settlement of 14 August 2006 of the case of *Rodolfo Correa Belisle* v. *Argentina*; the general trend in Latin America was indeed to restrict or to abolish military jurisdiction, although some countries, such as Peru and Colombia, were not moving in that direction.

59. The Chairperson of the Committee on Enforced Disappearances, Emmanuel Decaux, stated that, in the eight years since the submission by the Subcommission on the Promotion and Protection of Human Rights of its report to the Commission on Human Rights containing the draft principles governing the administration of justice through military tribunals,[16] there had been a number of developments. The European Court of Human Rights had referred to the draft principles in its jurisprudence,[17] the Committee had undertaken work on military justice, and the death penalty debate has evolved.

60. Observing that the International Convention for the Protection of All Persons from Enforced Disappearance did not make reference to the subject of military justice, Mr. Decaux stated that the Committee on Enforced Disappearances was preparing a statement on this issue. In its concluding observations on Belgium, the Committee had recommended that the State take the necessary legislative measures so that the crime of enforced disappearance was not subject to military jurisdiction in a time of war.[18] Mr. Decaux stated that a number of States, such as France, had eliminated military jurisdiction in peacetime but maintain it during a period of war. He emphasized that it was important to review military codes of justice periodically, even if they were applicable only in time of war.

61. Regarding the trial of civilians by military courts, Mr. Decaux referred to draft principle 5 and to the judgement of 31 May 2011 of the European Court of Human Rights on *Içen v. Turkey*. In this case, the Court affirmed that a tribunal composed exclusively of military magistrates should only try civilians in exceptional circumstances. The Court emphasized that military jurisdiction should not be used to try civilians unless there existed a compelling reason to justify such a situation, and when there was a clear and predictable legal basis for such action.

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[14] See also *Almonacid-Arellanol* v. *Chile*, judgement of 26 September 2006; *Gomez-Lund* v. *Brazil*, judgement of 24 November 2010; and *Gelman* v. *Uruguay*, judgement of 24 February 2011.

[15] *Radilla Pacheco* v. *Mexico*, judgement of 23 November 2009; *Ines Fernandez Ortega* v. *Mexico*, judgement of 30 August 2010; and *Valentina Rosendo Cantu* v. *Mexico*, judgement of 31 August 2010.

[16] See E/CN.4/Sub.2/2005/9.

[17] *Ergin* v. *Turkey*, judgement of 4 May 2006; *Maszni* v. *Romania*, judgement of 21 September 2006.

[18] CED/C/BEL/CO/1, para. 22.

62. With regard to draft principle 9, which stated that serious violations of human rights should not be judged by military courts, Mr. Decaux stated that this prohibition should extend to the investigation of such crimes, with civilian authorities having this responsibility. The Committee on Enforced Disappearances had recommended that the investigation of the crime of enforced disappearance be undertaken by the competent civilian authorities; and that a State party should adopt measures to ensure that the accused is suspended from his functions during the proceedings.[19] Mr. Decaux noted that there could be exceptions to this during a foreign military operation where it is not possible for an investigation to be undertaken by a civilian authority to gather evidence and identify witnesses. In such circumstances, the military police, the gendarmerie or other military authorities would have to undertake the investigation. Nevertheless, such an investigation should be subject to an independent judicial authority to have credibility.

63. Mr. Decaux pointed out that draft principle 8 stated the jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. He explained that military jurisdiction should remain exceptional and apply only to the requirements of military service. Such an exception could arise in a situation of foreign deployment where the national court is prevented from exercising its jurisdiction for practical reasons arising from the remoteness of the action, while the local court that would be territorially competent was confronted with the issue of jurisdictional immunities. He also noted that international humanitarian law also addressed the role of military justice.[20] While there may be justification for the trial of military personnel for military offences by military courts, the same did not apply to appellate jurisdictions, which should be civilian and integrated into the overall civilian judicial system, in accordance with draft principle 17.

64. Colonel Patrick Gleeson (retired), Office of the Judge Advocate General of the Canadian Armed Forces, addressed the issue of subject matter jurisdiction, and in particular draft principles 8 and 9, which he stated reflected an unwarranted bias against military courts in favour of civilian courts, and should therefore be either re-drafted or removed. He argued that this bias was troubling and internally inconsistent with goals and objectives of the draft principles.

65. Colonel Gleeson referred to the two core purposes of military justice codified in Canadian Military Justice Legislation: (a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and (b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society. He argued that this dual function made sense in a framework where the military was intended to serve broader society and reflect societal values. It was with these dual purposes in mind that draft principle 8 should be examined. Draft principle 8 concluded implicitly that only uniquely military offences have an impact on military discipline, and ultimately morale and operational effectiveness. Colonel Gleeson argued that this was simply not the case. Acts of theft, assault or fraud, the use of or trafficking in illicit drugs, for example, were all offences under civilian law. The fact that they happened to be civilian offences, however, in no way diminished their impact on discipline. An assault on a peer in a military unit had no less a corrosive effect on discipline and morale than an act of insubordination. Colonel Gleeson argued that to allow a military justice system to deal with insubordination but not the assault did not promote or advance the purposes of military justice; it rather undermined it. In addition, military interests and more broadly national

[19] CED/C/NLD/CO/1, para. 19; CED/C/PRY/CO1, para. 16.

[20] See Geneva Conventions relative to the Treatment of Prisoners of War, , arts. 84 and 102, and relative to the Protection of Civilian Persons in Time of War, art. 66.

interests often required that military justice systems be in a position to demonstrate an ability to prosecute offences, regardless of their nature, in a foreign State. This was particularly true when discussing the substance of Status of Forces Agreements entered into between sending and receiving States.

66. Colonel Gleeson further noted that the purpose and function of a military court, the unique requirements of military discipline, the impact that civilian criminal offences had on discipline and the practical requirements of nations deploying their forces on expeditionary operations all highlighted the appropriateness of military justice systems being in a position to exercise jurisdiction over civilian offences.

67. The extension of jurisdiction over civilian offences to military justice systems was not an "either/or" proposition. According to Colonel Gleeson, the Canadian justice system created a concurrent jurisdiction model between the military justice system and the civilian justice system. This model essentially provided that military personnel were liable to be charged and tried in either system for most civilian offences. There was no displacement of civilian jurisdiction; rather, there was a layering on of an additional option when an individual's status brought them within the jurisdiction of the military justice system. This concurrent jurisdiction had an extraterritorial effect, as defence legislation provided civilian courts with jurisdiction over any person subject to military jurisdiction who commits an offence outside the country.

68. With regard to draft principle 9, which provided that military courts should never exercise jurisdiction in response to allegations of serious human rights violations, Colonel Gleeson noted that two reasons for this position were advanced in the commentary on the draft principles. The first was that the commission of serious human rights violations was outside the scope of the duties performed by military personnel; and second, military authorities might be tempted to cover up such cases. He pointed out that, while it was true that the commission of serious human rights violations did not properly fall within the scope of the duties of military personnel, neither did the commission of "ordinary", crimes such as murder, rape, fraud or theft.[21]

69. Colonel Gleeson also argued that, where a court, military or otherwise, was properly constituted as described in draft principles 1, 2 and 12 to 15, there was no basis for a universally applicable rule, which would deny military jurisdiction over serious human rights violations. He maintained that the conclusion implied by draft principle 9, that military justice systems worldwide could not be trusted to deal with these offences, ignored the objective facts. He emphasized that such offences struck at the very core of military discipline and operational effectiveness. Armed forces had a significant interest in seeing that such breaches were dealt with fairly and expeditiously. It was important to recognize that the failure of military commanders to respond quickly and effectively to allegations of serious human rights violations raised potential questions of personal liability through the doctrine of command responsibility.

70. The second reason advanced in the commentary to support draft principle 9 was that military authorities might be tempted to cover up such cases. Draft principle 9 presumed that any military justice process would be inherently sympathetic to members of the military committing serious violations of human rights and be inclined to mitigate punishment imposed on the accused. Colonel Gleeson maintained that such an approach in a disciplined military force subject to appropriate civilian oversight was contrary to the ethos of a professional military. He noted, however, that should military justice systems fail

[21] See Michael Gibson, "International human rights law and the administration of justice through military tribunals: preserving utility while precluding impunity", *Journal of International Law and International Relations*, vol. 4, No. 1 (2008), pp. 1-48.

in this regard and impunity concerns arise, a model of concurrent jurisdiction, which existed in Canada, provided an important safeguard by ensuring recourse to the nation's civilian justice system.

71. Colonel Gleeson pointed out that these offences often arose in post-conflict States. In such situations, military forces were frequently one of the few institutions operating that had the resources and the organizational ability to effectively gather evidence and to bring alleged perpetrators to justice. Adopting an international standard that provided no circumstance in which military justice systems would be allowed to have jurisdiction over allegations of serious human rights violations could have the unintended effect of promoting impunity.

72. In the discussion, Mr. Seetulsingh stated that the focus should be on integrating military justice into the overall justice system. Mr. Benarbia found it difficult to understand why some ordinary offences, such as assault or rape, should be tried by military tribunals. Ms. Cerna agreed that the draft principles were an important part of the discussion.

IV. Main observations and recommendations

73. **The importance of the independence, impartiality and competence of the judiciary in military justice was recognized by all experts and participants. In a number of presentations, it was noted that, in some States, issues of command interference and lack of institutional independence were still a source of concern. In States where these issues were present, appropriate legislative and institutional reform should be undertaken.**

74. **The experts' presentations showed that, in some States, there were significant gaps in implementing the right to a fair trial. Questions were raised concerning the practice of summary proceedings for lesser offences, which in some States did not allow for the presence of legal counsel or the right of appeal. States were invited to take appropriate measures to ensure that the right to fair trial in military tribunals was in full conformity with the International Covenant on Civil and Political Rights.**

75. **Concerning personal jurisdiction of military tribunals, the Human Rights Committee had addressed this subject in its general comment No. 32, in which it stated that civilians should not be subject to the jurisdiction of military courts except in exceptional circumstances. The European Court of Human Rights had taken a similar position. It was also noted that international humanitarian law also provided limited circumstances for the trial of civilians in military courts. In some presentations, it was noted that some States tried civilians accompanying the military on overseas deployments, although it often depended on the specific situation.**

76. **With regard to subject matter jurisdiction, there was a difference of views among the experts. Some argued that military jurisdiction should be set aside in favour of civilian courts in cases where allegations of serious human rights violations were made against military personnel and that military jurisdiction should be limited to military offences, citing recommendations made by the Human Rights Committee and some special procedures. This view was, however, challenged by others at the expert consultation, who argued that, if a military tribunal was independent, impartial and competent, such crimes could be judged.**

77. **Given the detailed nature of the subject of military justice, and how human rights concerns could arise relative to many aspects of military jurisdiction, States were invited to request technical assistance and advisory services from OHCHR.**